

Internal Revenue Service
memorandum

date: JAN 11 1991

to: Director, Internal Revenue Service Center
Kansas City, MO
Attn: Entity Control

from: Technical Assistant
Employee Benefits and Exempt Organizations

subject: CC:EE:3 - TR-45-1348-90
Railroad Retirement Tax Act Status

Attached for your information and appropriate action is a copy of a letter dated October 05, 1990, from the Railroad Retirement Board concerning the status under the Railroad Retirement Act and the Railroad Unemployment Tax Act of the:

[REDACTED]

We have reviewed the opinion of the Railroad Retirement Board and, based solely upon the information submitted, concur in the conclusion reached by the Board that [REDACTED] is not an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

(Signed) Ronald L. Moore

RONALD L. MOORE

Attachment: Copy of letter from
the Railroad Retirement Board

cc: Mr. Gary Kuper
Internal Revenue Service
200 South Hanley
Clayton, MO 63105

08978

UNITED STATES OF AMERICA
RAILROAD RETIREMENT BOARD RECEIVED
844 RUSH STREET
CHICAGO, ILLINOIS 60611

90 OCT 10 AM 10:25

BUREAU OF LAW

OFFICE OF THE ASSISTANT
GENERAL COUNSEL (EMPLOYEE
BENEFITS AND EXEMPT
ORGANIZATIONS) CC:EE

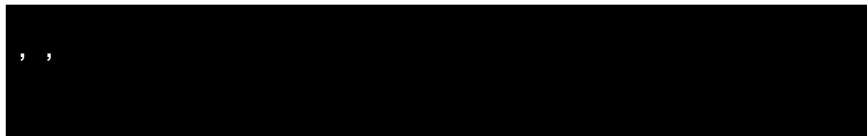
OCT 05 1990

Assistant Chief Counsel
(Employee Benefits and
Exempt Organizations)
Internal Revenue Service
1111 Constitution Avenue., N.W.
Washington, D.C. 20224

Attention: CC:IND:1:3

Dear Sir:

In accordance with the coordination procedure established between the Internal Revenue Service and this Board, I am enclosing for your information a copy of an opinion in which I have expressed my determination as to the status under the Railroad Retirement and Railroad Unemployment Insurance Acts of the following:



Sincerely yours,

A handwritten signature in cursive script, reading "Steven A. Bartholow".

Steven A. Bartholow
Deputy General Counsel

Enclosure

UNITED STATES GOVERNMENT

RAILROAD RETIREMENT BOARD

MEMORANDUM

SEP 20 1990

L - [REDACTED]

TO: Director of Research and Employment Accounts

FROM: Deputy General Counsel

SUBJECT: [REDACTED]

Employer Status

This is in reply to your request of February 16, 1990, for my opinion as to the status of [REDACTED] as an employer covered under the Railroad Retirement and Railroad Unemployment Insurance Acts. The status of this company has not previously been considered.

Information concerning the company in question has been obtained from the [REDACTED] from [REDACTED] and from various business publications. This evidence tends to establish that [REDACTED] was incorporated as a wholly owned subsidiary of the [REDACTED] in Delaware on [REDACTED] under the name [REDACTED]. The company purchased a fleet of box cars, which it in turn leased to [REDACTED] a fellow [REDACTED] subsidiary. As of [REDACTED], all freight cars were operated by the [REDACTED]. Sometime before [REDACTED], the then-named [REDACTED] began to transfer ownership of the cars directly to the [REDACTED], with the last cars transferred on that date. There is no evidence that during this time, [REDACTED] had any employees. Apparently, the company existed solely to acquire cars for lease to its corporate affiliate.

[REDACTED] entered the [REDACTED] field in late [REDACTED]. 1/ The company states it hired its first employees in [REDACTED], and changed its name to [REDACTED] on [REDACTED].

1/ [REDACTED] first ventured into the [REDACTED] field in [REDACTED] with the [REDACTED] sold excess capacity of [REDACTED] facilities used by the railroad, later combined with facilities of purchased companies. [REDACTED] became [REDACTED], later [REDACTED], and now [REDACTED] is no longer associated with the [REDACTED]. See: [REDACTED]

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██████████, to more clearly identify itself in the new field. The first aspect of ██████████'s business is ██████████ along the railroad right-of-way of the ██████████ in the ██████████ states in which ██████████ operates. ██████████ sells use of this ██████████ to ██████████ companies, including ██████████ and ██████████. In ██████████, ██████████ expanded its capacity to ██████████ states by entering into an agreement to purchase ██████████ of ██████████. ██████████ owns a ██████████ mile ██████████, also leased to various ██████████ companies. The purchase, ultimately concluded on ██████████, produced the ██████████.

In addition to selling use of ██████████ facilities, ██████████ also constructs ██████████ along ██████████ right-of-way for use by other ██████████ companies, including ██████████ and ██████████. These companies then use their own ██████████ and ██████████ to provide ██████████ to their customers. Together, ██████████ estimates these activities account for ██████████ percent of total staff time.

██████████ estimates its staff spends ██████████ percent of total time performing service for the related railroads. This service consists of obtaining ██████████ and ██████████ between ██████████ facilities and the internal ██████████ used by the railroads.

Section 1(a) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)) reads in part as follows:

"The term 'employer' shall include--

* * *

"(ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad * * *."

Section 1(a) of the Railroad Unemployment Insurance Act contains a substantially identical definition. As a wholly-owned subsidiary of ██████████, ██████████ has been under common control with a rail carrier within the meaning of the foregoing definition since its date of

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incorporation, [REDACTED]. The question remains as to whether now or at any time in the past it performed services in connection with railroad transportation within the meaning of the above mentioned Acts.

Prior opinions of this office have long held that leasing rail cars to rail carriers constitutes a service in connection with rail transportation. See, e.g., Legal Opinions L-38-258, and L-78-487. However, the United States Court of Appeals for the Seventh Circuit in IteI Corp. v. Railroad Retirement Board, 710 F. 2d 1243 (1983), held that car leasing could not be considered a service in connection with railroad transportation because it could not be included in a tariff regulated by the Interstate Commerce Act. The Court subsequently criticised its earlier decision as overreaching, suggesting instead a standard tied to the degree to which the affiliated company's business is related to the business of the rail carrier. Standard Office Building v. United States, 819 F. 2d 1371, (1987), at 1377-78. I therefore believe that where a carrier affiliate company owns rail cars which it leases primarily or entirely for use by the affiliated rail carrier, IteI and Standard Office Building read together support a conclusion that the non-carrier company is performing a service in connection with railroad transportation under the Acts.

While the evidence of [REDACTED]'s business is somewhat scant, [REDACTED] has written my office that "As of [REDACTED], all freight cars [acquired and leased by [REDACTED]] were operated by [REDACTED]." Under the foregoing analysis, it is clear that at least from this date, [REDACTED] provided solely to its affiliated carrier an item basic to transportation service: the freight cars used to render that service. Accordingly, it is my opinion that [REDACTED] was an employer under the Acts by reason of performing a service in connection with [REDACTED]'s railroad transportation business during the period from [REDACTED] through close of business [REDACTED], the date it transferred title to the last cars to the [REDACTED]. However, as there is no evidence that [REDACTED] had any employees during this time, it may be considered to have been an employer without employees. See Legal Opinion L-81-213.

The best available evidence indicates that in "late [REDACTED]" [REDACTED] (then named [REDACTED]) entered an entirely different business, [REDACTED]. In connection with this business, there is evidence that [REDACTED] obtains equipment for the rail carrier, and [REDACTED] employees perform [REDACTED] for the rail carrier. [REDACTED] over a large rail system such as that of the [REDACTED] is clearly crucial to conduct of rail transportation over that system, and therefore could be a service in connection with rail transportation.

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However, [REDACTED]'s principal business employs the existing right of way owned by its rail carrier affiliate in a novel fashion, mostly unrelated to the transportation of passengers or property by rail. The evidence is that total staff time devoted to rail carrier business of any sort is so insubstantial compared to the staff time devoted to [REDACTED] offered to unrelated [REDACTED] as to be casual in nature. See regulations of the Board at 20 CFR 202.6. Accordingly, based on the evidence available, it is my opinion that [REDACTED] has not been an employer under the Acts at any time since it entered the [REDACTED] field in [REDACTED].

Appropriate forms G-215 giving effect to the foregoing are attached.



Steve A. Bartholow

Attachments

KTSS/AX
KTBlank:KTB:aam
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